

**SANITIZED DEC. – 03-415 Rf – BY – GEORGE V. PIPER — SUBMITTED FOR
DECISION – 10/30/03 -- ISSUED – 11/17/03**

FINAL DECISION

Pursuant to W. Va. Code §§ 47-20-27 and 47-21-25, an order was issued by the Tax Commissioner whereby one of its members was prohibited, directly or indirectly, from obtaining bingo and/or raffle licenses, conducting bingo or raffle games, or leasing or providing licensee organizations any premises where such bingo or raffle occasions may be held for a period of ten (10) years.

In response the Petitioner, licensee, timely appealed said orders pursuant to W. Va. Code § 47-20-31(b)(2) and § 47-21-30(b)(2), within twenty (20) days after said Petitioner was served with same.

In due course, notice of hearing on the appeal was served upon the parties and the proceedings were conducted under Chapter 29A, Article 5, Section 1 et seq. of the West Virginia Code.

FINDINGS OF FACT

1. In the course of an investigation of the charitable gaming operations of the Petitioner, an organization licensed to conduct charitable raffle games under chapter forty-seven, article twenty-one of the West Virginia Code, investigators of the West Virginia State Tax Department's Criminal Investigation Division discovered raffle games on the premises of the aforementioned club for which the licensee organization could not produce invoices to show that the relevant taxes and fees had been paid, as required by § 47-23-9 of the West Virginia Code.

2. Investigation of the contraband games revealed that they had been purchased in a fictitious name. In a signed statement, one of its members admitted that he knew that the purchases were illegal; that they had been made in order to raise money for illegal purposes; and that a large dollar amount in illegal proceeds had been realized by the scheme.

3. Following an investigation by the Criminal Investigation Division, a grand jury returned an indictment against the member in question, charging him with twenty (20) felony counts: of fraudulently conducted raffle, two (2) counts; fraudulent

schemes, two (2) counts; falsifying accounts, fifteen (15) counts; and fraudulently conducted bingo, one (1) count.

4. On November 4, 2002, the State Tax Department's Criminal Investigation Division received a license renewal application from the Petitioner, listing the member in question as the Bingo and Raffle chairman of the organization for the license year 2003. An officer from one of the same organizations located in another town contacted the Director of the Criminal Investigation Division, and asked whether the member in question could legally serve as that organization's bingo and raffle chairman. The Director of the Criminal Investigation Division responded that, as of that time, the member in question had not been convicted of any of the crimes with which he had been charged, and the Criminal Investigation Division had no legal reason to deny the applications.

5. On December 3, 2002, the prosecuting attorney of the County agreed to reduce the felony charges and allowed the member in question to plead guilty to a misdemeanor charge of a fraudulent scheme, the fourth count of the indictment. The text of the indictment was as follows:

FOURTH COUNT: And the Grand Jurors aforesaid, upon their oaths aforesaid, further charge that [the member in question and two other members] between the 4th day of June, 2000, and the 10th day of January, 2001, in that county in West Virginia, did unlawfully, feloniously, knowingly, fraudulently and willfully engage in a fraudulent scheme, in that [the said member in question, and two other members,] did unlawfully, feloniously, knowingly, fraudulently and willfully deprive the State of West Virginia and qualified recipient non-profit organizations of certain monies, goods, chattels and property to which they were entitled, by means of fraudulent pretenses and representations, to-wit: by means of then and there unlawfully, feloniously and fraudulently obtaining certain raffle games in a different name, when in truth and fact, said raffle games were purchased for use at a different organization, a corporation, and did then and there unlawfully, feloniously and fraudulently fail to report the results of said raffle games to the State of West Virginia, through the West Virginia State Tax Department as required by law, and as a result of the failure of [the said member in question, and the two other members,] to report the results of said raffle games as aforesaid, did unlawfully, feloniously and fraudulently defraud the State of West Virginia and various qualified recipient non-profit organizations out of the sum and amount, or more, to-wit: of the cumulative value, all of which being unlawfully, feloniously, willfully and fraudulently obtained as a part or portion of a common scheme or plan, in violation of the provisions of Chapter 61, Article 3, Section 24d of the West Virginia Code, as amended, against the peace and dignity of the State.

6. On March 28, 2003, the Criminal Investigation Division became aware that the member in question was still participating in the charitable gaming activities. After this information was verified, the organization was advised that the member in question was ineligible to participate in its charitable gaming operations because of his conviction for a gambling offense, and that he would have to be removed. The Tax Commissioner issued an Order on June 12, 2003, requiring the Petitioner to prohibit the member in question from participating in the conduct of its charitable gaming activities, in accordance with *West Virginia Code* §§ 47-20-27 and 47-21-25.

CONCLUSIONS OF LAW

1. The burden of proof rests with the Petitioner to show cause why the order of the Tax Commissioner, under W. Va. Code §§ 47-20-27 and 47-21-25 should be modified, in whole or in part, or set aside. See W. Va. Code §§ 47-20-31(b)(4) and 47-21-30(b)(4).

2. A misdemeanor fraudulent scheme conviction is “A misdemeanor for a gambling offense” within the meaning of W. Va. Code §§ 47-20-27 and 47-21-25 when the underlying activity was the conduct of charitable gaming activities with the intention of fraudulently diverting the proceeds to impermissible purposes.

3. The member in question pled guilty to a misdemeanor count of conducting a fraudulent scheme under *West Virginia Code* § 61-3-24d, which provides that:

(a) Any person who willfully deprives another of any money, goods, property or services by means of fraudulent pretenses, representations or promises shall be guilty of the larceny thereof.

(b) In determining the value of the money, goods, property or services referred to in subsection (a) of this section, it shall be permissible to cumulate amounts or values where such money, goods, property or services were fraudulently obtained as part of a common scheme or plan.

(c) A violation of law may be prosecuted under this section notwithstanding any other provision of this code.

4. Under West Virginia's canons of statutory construction, ""Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation." *Syl. Pt. 2, Crockett v. Andrews*, 153 W. Va. 714, 172, S.E.2d 384 (1970).’ *Syllabus point 4, Charter Communications VI, PLLC v. Community Antenna Service, Inc.*, 211 W. Va. 71, 561 S.E.2d 793 (2002). *Syllabus point 3, Longwell v. Bd. Of Educ. Of Marshall*, 583 S.E.2d 109 (W. Va. 2003).

The terms “gambling” and “offense” are not ambiguous, therefore the plain meaning of the phrase “misdemeanor for gambling offense” is to be accepted and applied without resort to further interpretation.

5. There was no testimony by the Petitioner that the Commissioner’s Order of June 12, 2003 was unduly or unreasonably delayed. The licensing year for charitable gaming runs from January first through December thirty-first, so the action was taken approximately midway through the current license year. There is no statutory limitation on when the Tax Commissioner may properly take administrative action against a licensee for violations of West Virginia’s charitable gaming laws; therefore, the Tax Commissioner’s Order of June 12, 2003 was timely.

6. In any event Petitioner’s rights were not prejudiced by the State’s delay, if any, in instituting administrative action to bar the member in question’s continued participation in its charitable gaming operations. There was no testimony by the Licensee that there was any detriment to the Petitioner from the State’s delay in bringing this action or that Petitioner relied to its detriment on representations by the State that the member in question could continue to participate in its charitable gaming operations following his conviction. If anything, the member in question

benefited from any delay, by receiving paychecks from the Petitioner for conducting its charitable gaming operations for seven months following his conviction. If either the Petitioner or the member in question suffered at all from the delay, they suffered nothing more than the thwarted hope that the State would not notice that they were knowingly operating in violation of the law, and that the member in question could continue running the Petitioner's charitable gaming operations despite his conviction for larceny by means of a fraudulent scheme.

7. As a matter of law, the member in question's claim that he was induced to enter a guilty plea to a misdemeanor count of a fraudulent scheme by the State's representations because such a plea would not jeopardize his continued employment with the Petitioner is of no moment because the Department was not privy to any discussions that took place between the prosecuting attorney and the member in question prior to his entering a plea, and because such a plea does not alter the statutory consequences of his actions.

8. It is clear from the language of the indictment that the underlying scheme for which the member in question was convicted was an illegal gambling operation. The fraud involved the diversion of funds, which according to the West Virginia Constitution and according to statute, must go to charitable or public service purposes. Instead, according to the member in question's sworn statement, the gambling proceeds were diverted to pay wages and salaries of individuals, and to pay the general expenses of the club, impermissible expenses.

CONCLUSION

For the reasons stated, The Tax Commissioner's Order of June 12, 2003, requiring the Petitioner to prohibit the member in question from participating in its charitable bingo and raffle activities for a period of ten years from the date of his conviction is **AFFIRMED**.